United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7435

To be argued by
JAMES M. HUGHES

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MURRAY GLADSTONE,

Plaintiff-Appellant,

v.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Statement

This is an appeal by the plaintiff-assured, Murray Gladstone, from an order and judgment (p. 105a) granting summary judgment in favor of the defendant Company dismissing plaintiff's complaint upon the merits, which order and judgment was entered in the Southern District of New York (Werker, J.) on July 14, 1975.

Facts

That portion of plaintiff's brief designated STATEMENT is incomplete and is to some extent also inaccurate and misleading. Furthermore, no appropriate reference is made in plaintiff's statement of facts to the record itself to support some of the claimed "facts" set forth in the STATEMENT—all in violation of Rule 28 of the Federal Rules of Appellate Procedure.

Nowhere in plaintiff's statement of facts is any mention made that the plaintiff-assured admittedly signed the Proposal for Jewelers' Block insurance on April 27, 1971 (p. 33a) and that the answers of the plaintiff contained in the signed Proposal were directly related to the premium rate on which the policy of insurance was issued as well as to the risks assumed thereon by the defendant Company (p. 103a).

Furthermore, no mention is made by plaintiff that the lower court concluded as a matter of law, based upon the undisputed facts hereinafter referred to, that neither *proper* written notice of loss, nor *proper* written proof of loss was given by the plaintiff-assured to the defendant Company (p. 101a).

Plaintiff's counsel has also omitted from his STATEMENT the further pertinent fact that the court below took pains to spell out in precise detail those particulars in which plaintiff's purported "proof of loss" was found to be deficient as a matter of law in failing to meet the requirements of the policy (p. 102a). The question as to the sufficiency of a purported proof of loss does not involve a question of fact, as the plaintiff contends in his STATEMENT, but rather is a question of law, which question was decided adversely to the plaintiff by the court below.

The plaintiff also omits from the STATEMENT any reference whatever to the Jewelers' Block Rating Slip

(Exh. "B," p. 37a), as if said document did not exist and had no bearing whatever upon the issues in this appeal. The Rating Slip was prepared by Insurance Services Office of New York, a rating organization in which the defendant Company is a subscriber, based solely upon the answers given by plaintiff in the signed Proposal in order to compute the premium rate charged to the plaintiff (p. 8a).

The plaintiff's STATEMENT also omits any reference to the fact that defendant, a licensed insurer in New Jersey was required to file with the Commissioner of Banking and Insurance of New Jersey its schedule of rates for the Jewelers' Block policy and is prohibited by law from deviating from the schedule of rates thus filed (p. 9a). The plaintiff's STATEMENT also omits to state that said rating schedule was used by the rating organization in preparing the Jewelers' Block Rating Slip herein (p. 9a).

Not only has plaintiff omitted to set forth the foregoing material facts, among others, in the STATEMENT, but plaintiff is equally at fault in presenting certain of the facts in such a light as to make them not only inaccurate but also misleading. To mention several of the more glaring examples—the Jewelers' Block policy herein was initially written on binder dated May 7, 1971 by the defendant Company's own duly authorized agent, W. M. Ross & Co. Inc., Upper Montclair, New Jersey, "in accordance with application [Proposal] on file with company" (p. 85a). The policy of insurance was countersigned by the aforementioned authorized agent, W. M. Ross & Co. Inc., effective May 7, 1971 to May 7, 1972 (pp. 79a-80a). While plaintiff frankly admits that he only gave phone notice of the loss to W. M. Ross & Co. Inc., nevertheless, plaintiff would have it appear in his STATEMENT that W. M. Ross & Co. Inc. acted solely as agent on behalf of the plaintiff-assured (rather than the Company's authorized agent) in subsequently mailing to its principal its own customary printed form of Notice of Loss. This, it is submitted, does not cure

plaintiff's failure to give *written* notice of the loss in the first instance to either the Company or to its authorized agent, W. M. Ross & Co. Inc., as required by the policy (p. 95a).

Another misleading statement in plaintiff's STATEMENT deals with plaintiff's assertion that "The defendant also chose to retain the premium and has never returned it." Suffice it to say that there is no evidentiary fact in the record before this Court to support such statement and, more importantly, such issue was never raised in the court below. Judge Werker in his decision declaring the policy to be null and void because of the plaintiff-assured's breach of the warranties in the policy directed the defendant Company at that juncture of the case to refund to the plaintiff the premium, if any, paid by plaintiff (p. 104a). As previously stated, the facts with respect to any alleged retention of the premium by the defendant are not in the record, nor was the said issue ever raised by the plaintiff in the court below. It is submitted that such issue cannot be raised for the first time on appeal, particularly when there are no facts in the record to support such an issue.

Another statement made by plaintiff which is calculated to mislead this Court is to the effect that plaintiff did not actually receive the Jewelers' Block policy herein until June 18, 1971. Plaintiff's counsel in his affidavit makes the hearsay affirmation that plaintiff received the insurance policy "18 days after the loss, and 8 days after plaintiff had issued his 'alleged proof of loss'" (p. 64a). This would place the date of receipt of the policy by plaintiff on or about June 8, 1971, and not on June 18, 1971. The date of issuance of the policy is shown on its face to be 6/8/71 (p. 75a).

However, the law is clear that the date of receipt of a policy by an assured or the date of issuance thereof is of no importance where a binder is involved since the "terms and provisions which control in the construction of the

coverage afforded by a binder are those contained in the ordinary form of policy usually issued by the company at that time upon similar risks" (*Appleman on Insurance Law and Practice,* Vol. 12, Sec. 7225). The authorities throughout the country are in general agreement that once a binder is in effect, it is deemed to include all the terms of the policy to which the binder was given, and the binder has the same effect as the policy. This is the law in New Jersey.

> *J. C. Smith & Wallace Co.* v. *Prussian Natl. Ins. Co.,* 68 N.J.L. 674, 54 A. 458.

In the above case the court said, and we quote:

> "The plaintiff by accepting the binder *agreed to be bound by all terms of the policy,* including the rate of premium to be paid, and the defendant ought not now be allowed to say we are not bound to keep that contract, because no specific premium was mentioned." (p. 677) (emphasis supplied)

To the same effect, see:

> *Hammond* v. *Insurance Co. of No. America,* 37 F.Supp. 674, aff'd, 118 F.2d 1013 (C.C.A. 2)
> *Kahn* v. *Lumbermens Mutual Ins. Co.,* 293 F.Supp. 985
> *Eames* v. *Home Ins. Co. of N.Y.,* 94 U.S. 621

Law of New Jersey Applicable to the Issues in the Case

This is a federal diversity case involving a New Jersey resident and a California corporation authorized to engage in the business of insurance in the State of New Jersey. The policy of insurance was applied for, issued and delivered in New Jersey and was to be performed there. The situs of the insured risk is New Jersey, and

the loss for which the plaintiff-assured sues occurred in New Jersey.

A federal court sitting in New York must apply New York's choice of law rules. *Klaxon Co.* v. *Stentor Elec. Mfg. Co. Inc.,* 313 U.S. 484. It is also clear that New York's choice of law rules in actions based on contract is the "grouping of contracts" or "center of gravity test." *Auten* v. *Auten,* 308 N.Y. 155. It has recently been adjudicated in this District that the rule in *Auten* v. *Auten* prevails in contract actions in New York. *Hutchens* v. *Bethel Methodist Home,* 370 F.Supp. 954. See also *Couch on Insurance,* 2d Vol. 2, Sec. 16:19.5, p. 13 (1974 Supp.).

The law of a sister state need not be pleaded or proved. *McIndoo* v. *Burnett,* 494 F.2d 1311, 1313; *Colello* v. *Sundquist,* 137 F.Supp. 649, aff'd, 229 F.2d 737 (2d Cir.).

The Statement, and Controverting Statement Under General Rule 9(g) Required to Be Filed With the Court on a Motion for Summary Judgment

The plaintiff's counsel in his brief requests this Court to disregard and not consider defendant's Statement under General Rule 9(g) for the reasons stated therein. The defendant's Statement under General Rule 9(g) was served upon plaintiff's counsel by mail on May 29, 1975 (p. 48a). No controverting Statement was received from plaintiff's counsel. The defendant's Statement under Rule 9(g) was never at any time returned by the Post Office to the office of defendant's counsel as being undeliverable for any reason.

In reply to plaintiff's request, it is sufficient to point out that it can be assumed that plaintiff's counsel is or should be conversant with the General Rules of the Southern District of New York dealing with the requirement placed upon both parties to a motion for summary judg-

ment to submit to the court a particularized statement outlining the contentions of both parties as to the existence or non-existence of a genuine material issue of fact. Needless to say, upon receipt by plaintiff's counsel of the defendant's motion papers for summary judgment, or shortly thereafter, a simple phone call directed to counsel for the moving party would have quickly uncovered the existence of the defendant's Statement under Rule 9 (g)—assuming that plaintiff's counsel had not already received such Statement. We submit that the believable facts speak rather convincingly for themselves, and no further comment is required from us.

The Jewelers' Block Policy and Signed Proposal

The Jewelers' Block policy, and signed Proposal attached thereto, both of which are annexed to plaintiff's complaint and marked Exhibit "A," contain very important provisions which are pertinent to the question of the Company's liability in this case.

The Jewelers' Block policy herein contains the following provision in the opening paragraph thereof:

> "1. In consideration of the premium specified, and of the proposal and declarations dated (shown below) *attached hereto and made a part hereof and which is (are) hereby agreed to be the basis of this policy, and which the insured hereby warrants to be true as to each and every statement and particular contained therein,* the company does insure the insured named above, herein called the insured, whose address is shown above and whose premises are located at (shown below) from the inception date above to the expiration date above." (emphasis supplied)

It has been held in New Jersey that the written application of the assured when referred to in the policy as form-

ing part of it, is part of the contract, and has the same effect as though written in the body of the contract.

> *Carson* v. *Jersey City Insurance Co.*, 43 N.J.L. 300, 39 Am.Rep. 584, aff'd, 44 N.J.L. 210.

The signed Proposal annexed to the policy and made a part thereof bearing date of 4-27-71 contains the following warning statement in printed form in two (2) separate locations on the face of the Proposal, viz., immediately preceding all of the questions and again at a location atop Question 11:

> "*The answers to questions 2, 11a, 11c, 11d, 17c and 17d must be based on the 12 months period immediately preceding the date of this proposal.*" (emphasis supplied)

The Court will also note that it is stated in both the Proposal and the policy itself that an assured's answer to *each* question contained in the signed Proposal, upon which answers the Company relies in fixing the premium rate and also in evaluating the risk, constitutes a warranty and not a mere represen[illegible]ion of fact. In addition, the signed Proposal, which is referred to in the policy as forming part of it, is a part of the contract of insurance.

The Proposal, so far as the Company is concerned, has a twofold purpose. The information contained therein furnished by the prospective assured in answer to the various printed questions determines whether the insurance company will be willing to undertake to insure the particular applicant and, if so, then the answers to such questions are used for the purpose of rating the policy for the purpose of computing the entire premium which is to be charged to the assured, and evaluating the risk.

Undisputed Facts

Based upon the plaintiff-assured's sworn pre-trial testimony and also his sworn answers to defendant's interrogatories, coupled with those facts not controverted by plaintiff in the court below, certain facts directly related to the proof of the affirmative defenses passed upon by the lower court now stand admitted for the purposes of this appeal. The said undisputed and admitted facts are as follows:

1. The plaintiff signed the Proposal for Jewelers' Block insurance on April 27, 1971.

2. The Jewelers' Block insurance was bound in writing on May 7, 1971 in accordance with application (Proposal) on file with the Company (Exh. 12, p. 85a).

3. The plaintiff swore in answer to defendant's Interrogatory #30 that the percentage amount of plaintiff's business based on sales for the one-year period *prior* to the signing of the Proposal was *all* wholesale.

4. The plaintiff swore in answer to Interrogatory #29 that he filed a sales tax return with the State of New Jersey for the period November 1, 1970 to March 31, 1971 disclosing that all his sales for said period were at wholesale.

5. Plaintiff testified upon examination before trial and freely admits that during the period October 1, 1970 to the date of the signing of the Proposal he had in his personal custody and possession a quantity of jewelry which he exhibited and sold to customers in various states throughout the United States.

6. Plaintiff testified upon examination before trial that during the period from October 1, 1970 to the

date of the signing of the Proposal, he stored certain of his jewelry stock in the safe on the premises of Modern Jewelry Casting Co. Inc. in New York City.

7. Plaintiff swore in answer to Interrogatory #32 that the only so-called "Proof of Loss" filed by him with defendant at any time relative to the subject loss was a signed statement dated June 1, 1971 given by him to an agent of the defendant Company (Exh. "C," p. 38a).

8. Plaintiff gave telephone notice of the subject loss to W. M. Ross & Co. Inc., Upper Montclair, New Jersey, the Company's own agent.

9. By statute, Chap. 29A of the New Jersey Statutes Annotated, Sec. 17:29A-6, the defendant Company, a licensed insurer in New Jersey, was required to file with the Commissioner of Banking and Insurance of New Jersey at Trenton, New Jersey, its schedule of rates for various classes of insurance, including the Jewelers' Block policy, and Sec. 17:29A-15 of said Act prohibits an insurer from charging or receiving any rate which deviates from the schedule of rates thus filed.

10. The rating schedule filed by defendant was used in preparing the Jewelers' Block Rating Slip (Exh. "B," p. 37a) by the rating organization in which defendant is a subscriber.

11. If the plaintiff's answer to Question #2 or Question #11 had been correctly given, a higher premium would have been charged than was actually charged to plaintiff in this instance pursuant to the defendant's filed rate schedule (p. 12a).

Questions Presented

From the undisputed and admitted facts on the summary judgment motion herein, the following questions are presented:

1. Whether the plaintiff's signed statement dated June 1, 1971 (Exh. "C", pp. 38a-44a) constitutes a proper filing of sworn Proof of Loss with the Company in compliance with Condition 13 of the policy as a matter of law?

2. Whether a phone notice rather than a written notice given by plaintiff to the Company's own authorized agent constitutes a proper written notice of loss to the Company in compliance with Condition 13 of the policy as a matter of law?

3. Whether any of the documentary evidence submitted by the plaintiff in the court below, consisting of plaintiff's Exhibits "1" through "6," complies with that condition precedent in the policy requiring plaintiff to furnish to defendant a complete list of the lost property, stating the market value and cost of each article and the amount claimed thereon, and whether the failure of plaintiff to do so constituted a breach of Condition 13 of the policy as a matter of law?

4. Whether the answer given by plaintiff to Question 2 of the Proposal signed by him covering the 12-month period immediately preceding the date of the Proposal constituted a breach of warranty based upon the sworn answer given by plaintiff to defendant's interrogatory?

5. Whether the answer given by plaintiff to Question 11a, c and d of the Proposal signed by him covering the 12-month period immediately preceding the date

of the Proposal constituted a breach of warranty based upon plaintiff's sworn pre-trial testimony?

6. Whether the answers given by plaintiff to the questions contained in the Proposal signed by him were the basis for evaluation of the risk as well as the fixing of the premium by the defendant Company pursuant to defendant's filed rate schedule?

7. Whether the defendant Company could have lawfully entered into the subject contract of insurance with the plaintiff herein upon the basis of the premium charged to plaintiff if the true answers were given by plaintiff in the Proposal?

Summary of Argument

Plaintiff not only attempts in his brief to create an alleged ambiguity in the questions contained in the Proposal, where none exists, but also attempts to infuse the words "new business" into the meaning behind each and every question set forth in the Proposal so as to lay the foundation for his argument that the questions were intended to cover the 12-month period subsequent to the opening of his "new business." A cursory reading of the Proposal quickly discloses that many of the questions asked of a prospective assured deal with the prospective assured's business activities and loss experience, etc., *prior* to the signing of the Proposal, e.g., a question as to the nature of the prospective assured's previous 12 months' business based on sales (Ques. 2); a question covering the prospective assured's losses during the previous five years involving property covered by the same form of policy (Ques. 4); a question as to whether any insurer had ever canceled or refused to issue any insurance for the prospective assured (Ques. 5); a question as to whether and how often the prospective assured had taken a physical stock inventory in the past (Ques. 6); a

question as to whether the prospective assured is a member of the Jewelers' Security Alliance (Ques. 7); a question as to the location of property outside of the prospective assured's premises for the preceding 12 months in the custody or control of the prospective assured, his employees, salesmen, etc. (Ques. 11a); a question as to the estimated average daily amount of property in the custody or control of others for the previous 12 months, e.g., consignment merchandise in the custody or control of memorandees (Ques. 11c); a question as to the maximum amount of the prospective assured's stock during the previous 12 months not exceeding the dollar amount stated by the prospective assured in the Proposal (Ques. 17c); and a question as to the estimated average daily amount of other people's property in the prospective assured's custody or control, insured or uninsured, for the preceding 12 months for any purpose whatsoever (Ques. 17d). Thus, it can readily be seen that many of the questions in the Proposal were designed with the thought in mind of obtaining from the prospective assured certain precise information warranted to be true as to his previous business activities and loss experience, the location of jewelry outside the prospective assured's premises for the preceding 12 months, and other precise data, to enable the Company (a) to determine whether to accept the insurance in the first place, (b) to evaluate the risk, and (c) to fix the premium to be charged. The factual picture involved in this case is certainly not akin to the situation where a prospective assured was never before involved in the jewelry business and was setting up such type of business for the very first time. On the contrary, by plaintiff's own admission, he had spent more than thirty years in the jewelry business (p. 49a), and his prior business activities and loss experience constituted essential information to the Company for obvious reasons.

Plaintiff's feeble argument that the premium rate is based only upon the business for which the policy is sought

and is unaffected by plaintiff's *prior* business activities entirely overlooks the underlying basis and extreme importance to the Company of truthful answers to the questions contained in the Proposal in evaluating the risk and in subsequently fixing the premium rate. Needless to say, the insuring of valuable jewelry presents a moral hazard, and the Company is entitled to have before it all of the information called for in the Proposal, particularly from one who has been engaged in the jewelry business for over thirty years, to enable it to properly evaluate the risk it is asked to insure.

Plaintiff's counsel also blandly makes the wholly unsupported statement that the Company's special agent and underwriter (Forrester) had full knowledge of all material facts with respect to the plaintiff's prior business activities at the time the plaintiff signed the Proposal based upon discussions had with plaintiff. Aside from the binding effect of the parol evidence rule which contemplates that all prior discussions had between the parties themselves are bound up in the writing itself (Proposal) which by its terms is made a part of the contract of insurance, the fact also remains that under New Jersey law, as we show hereinafter, an applicant signing a Proposal for insurance is conclusively presumed to have read the Proposal which he signs and is bound by the answers contained therein, notwithstanding the fact that the answers may have been innocently or mistakenly made or may have been inserted in the Proposal by another on his behalf. Thus, any alleged knowledge on the part of the defendant's agent as to the prospective assured's past business activities gained from discussions had with the prospective assured is irrelevant and immaterial since the prospective assured is conclusively presumed to have read the Proposal before signing same and, accordingly, always had the opportunity to change or delete any incorrect answer in the Proposal before signing same, despite any knowledge possessed by the Company's agent.

Plaintiff's argument that the defendant issued the policy after allegedly having full knowledge of all material facts and is therefore estopped from asserting any and all defenses which it may have under the policy has no merit to support it for several very basic reasons.

In the first place, the date of issuance of the policy by defendant is immaterial in this case since both the plaintiff-assured and the defendant Company were, as previously pointed out, fully bound by all of the terms and conditions of the Jewelers' Block policy on the date when the insurance was bound, viz., May 7, 1971, and not on the date of issuance of the policy.

In the second place, the plaintiff accepted the insurance policy with the annexed Proposal containing the misrepresentations. In doing so, as we show hereinafter, he adopted and ratified the misstatements contained therein, and they are binding upon him. In the third place, the alleged knowledge of "all facts" said to exist on the part of the defendant on the date of issuance of the policy on June 8, 1971 obviously could not excuse plaintiff's *subsequent* failure to (a) file a proper sworn proof of loss, and (b) submit a complete list of the stolen property, etc., to the Company under Condition 13 of the policy, since such failure on plaintiff's part antedated the time of defendant's alleged knowledge. The only evidentiary data in the record reflecting any knowledge of facts on defendant's part is Exhibit "C" (pp. 38a-44a), and the "facts" contained therein certainly could not create an estoppel, as plaintiff contends.

ARGUMENT

POINT I

An applicant signing a proposal for insurance relating to a policy of insurance made and issued in New Jersey is *conclusively* presumed to have read the proposal which he signs and is bound by the answers contained therein even if such answers are innocently, negligently or mistakenly made and also notwithstanding the fact that the answers may have been inserted in the proposal by another on his behalf.

There is no dispute of fact in this case but that plaintiff signed the Proposal for Jewelers' Block insurance herein. Furthermore, there is no evidence in the record whatever of any fraud or overreaching conduct on the part of the defendant's representative, Forrester, in inducing the plaintiff to sign the Proposal without having read the same.

An analysis of plaintiff's brief as a whole discloses that plaintiff is in fact attempting to argue two separate and conflicting legal theories dealing with the signed Proposal and the questions and answers contained therein. On the one hand, plaintiff asserts that Forrester had full knowledge of all the facts regarding plaintiff's prior business activities and the location of plaintiff's jewelry stock prior to the signing of the Proposal and inserted untrue answers in the Proposal not given to him by plaintiff, thereby estopping the defendant from asserting any defenses under the policy based upon such untrue answers. On the other hand, plaintiff asserts (POINT I) that the answers provided by plaintiff to Questions 2 and 11 of the Proposal were in fact correct on their face. Plaintiff has no doubt adopted these alternative positions to offset any possible argument by defendant that to permit plaintiff to furnish oral evidence with respect to prior conversations

allegedly had between plaintiff and defendant's agent (Forrester) not embodied in the plaintiff's answers in the signed Proposal itself would be in violation of the parol evidence rule.

It has been held in New Jersey that parol evidence to the effect that an insurer knew when it issued its policy of the existence of an antecedent insurance was bad as it was an attempt to alter the written contract by parol. *Bennett* v. *St. Paul Fire and Marine Insurance Co.*, 55 N.J.L. 377; see also, *Dewees* v. *Manhattan Insurance Co.*, 35 N.J.L. 366.

If, as plaintiff asserts, the answers appearing in the Proposal to Questions 2 and 11 are on the other hand to be considered as being actually true and correct on their face, the theory of an estoppel, as expressed by plaintiff, has no validity for obvious reasons. Thus, an analysis of the position taken by plaintiff to the effect that his answers to Questions 2 and 11 were correct on their face merits attention. Plaintiff asserts that Questions 2 and 11, coupled with the instructions which precede such numbered questions, are ambiguous and that the answers as actually given by him to said questions are true and correct on their face. To support the erroneous conclusion that the said questions are ambiguous, plaintiff proceeds by a process of rather tenuous and strained reasoning to argue at length that the preliminary instructions directing that Questions 2 and 11 be answered on the basis of the preceding 12-month period contemplated the 12-month period with respect to the plaintiff's business (retail store) which had not opened as yet at 263 Center Avenue, Westwood, New Jersey. Plaintiff further argues that with respect to the business at 263 Center Avenue, Westwood, New Jersey, which was not then in existence, there was no preceding 12-month period, and the questions could only be answered on the basis of the then present estimates and expectations. This argument completely overlooks the fact that the prospective assured named in an-

swer to Question 1a, viz., Murray Gladstone T/A Jewelry by Gladstone, has by his own sworn pre-trial testimony admitted that he operated a jewelry business in the very same name from his home in Westwood, New Jersey during the period October 1, 1970 to the date of the signing of the Proposal on April 27, 1971, and further that he traveled extensively throughout the United States displaying and selling his jewelry to potential customers during that particular period of time. As Judge Werker commented in his memorandum decision in the court below, "the insured is a sophisticated jewelry merchant who has had prior experience with jewelers block insurance policies."

If this Court were to accept and adopt plaintiff's strained construction of the wording in the Proposal, it would in effect be writing a new contract for the plaintiff, deleting thereby all reference in the Proposal to the nature and identity of any jewelry business conducted by a prospective assured for the 12-month period immediately preceding the date of the signing of the Proposal and, for that matter, deleting all reference to the location and estimated amount of jewelry in the custody or control of the prospective assured or others during such prior 12-month period. The thrust of plaintiff's argument appears to be that the answers given by him to Questions 2 and 11 covered by mistake the 12-month period commencing with the opening of the plaintiff's retail store at Westwood, New Jersey, and not the 12-month period immediately preceding the date of the signing of the Proposal, notwithstanding the clear and unambiguous language contained in the Proposal to the contrary. Unfortunately, however, the premium rate which was charged to the plaintiff in relation to Questions 2, 11a, 11c, 11d, 17c and 17d was predicated upon the answers given by plaintiff in the Proposal with respect to the period immediately preceding the date of the signing of the Proposal as stated in the Proposal, and not to the 12-month period commencing with

the opening of plaintiff's new store in Westwood, New Jersey. Again referring to Judge Werker's comment regarding the expertise and prior background of plaintiff in matters dealing with Jewelers' block policies, the best thing that can be said on plaintiff's behalf in this instance is that he either was mistaken regarding the meaning and content of the above-mentioned questions contained in the Proposal, or that he furnished untrue answers to defendant's representative. In either case, plaintiff is bound by the answers as actually set forth in the Proposal notwithstanding the fact that he may not have read the Proposal before signing same or that the answers were innocently or mistakenly made.

The law is now clear in New Jersey that an applicant for insurance in the absence of any fraud practiced upon him, is *conclusively* presumed to have read the application which he signs and is thereby bound by each and every statement made in it.

> *Metropolitan Life Insurance Co.* v. *Alvarez,* 133 N.J.Eq. 65, 30 A.2d 297.

In the foregoing case the court said, and we quote:

> "This court in a long line of cases has held that an applicant for insurance is, in the absence of fraud practiced upon him, conclusively presumed to have read the application which he signs and is thereby bound by it. *Equitable Assurance Society* v. *Gutowski,* 119 N.J.Eq. 181; 181 Atl. Rep. 636; *Pacific Mutual Life Insurance Co.* v. *Rosenthal,* 122 N.J.Eq. 155; 192 Atl. Rep. 742; *Metropolitan Life Insurance Co.* v. *Coddington, supra.*
>
> "A copy of the insured's application was annexed to the policy issued, and was made a part thereof. *The insured accepted the policy with the annexed application containing the misrepresentations; in doing so, he adopted and ratified the misstatements contained*

therein and they are binding upon him and his beneficiary. Locker v. *Metropolitan Life Insurance Co.,* 107 N. J. Law 257; 151 Atl. Rep. 627; *Crescent Ring Co.* v. *Travelers Indemnity Co.,* 102 N. J. Law 85; 132 Atl. Rep. 106; *Dewees* v. *Manhattan Insurance Co.,* 35 N. J. Law 366; *Pacific Mutual Life Insurance Co.* v. *Rosenthal, supra.*" (p. 68) (Emphasis supplied)

The plaintiff herein contends that the answers listed in the Proposal were inserted therein by an agent of the defendant Company, and not by plaintiff himself. Nevertheless, there is no dispute as to plaintiff's signature on the Proposal itself nor as to the fact that plaintiff himself furnished the information upon which the answers to the questions in the Proposal were based. Under such circumstances, it has been held that where an applicant makes the medical examiner and the insurance agent the agents of the assured, any untrue answers entered by the solicitor (insurance agent) and the medical examiner on the application and signed by the applicant, constitute a breach of warranty.

Dimick v. *Metropolitan Life Ins. Co.,* 69 N.J.L. 384, 55 A. 291, 62 L.R.A. 774.

The law is equally clear in New Jersey by a long line of decisions that where any answer in the signed proposal is untrue, *even if innocently made,* the underwriter avoids liability for any loss sustained by the assured.

Procacci v. *U.S. Fire Ins. Co.,* 118 N.J.L. 423, 198 A. 180;

Weinroth v. *N.J. Mfrs. Assn. Fire Ins. Co.,* 117 N.J.L. 436, 189 A. 73;

Neilson v. *American Mutual Liab. Ins. Co. of Boston,* 111 N.J.L. 345, 168 A. 436;

Owen v. *Metropolitan Life Ins. Co.,* 74 N.J.L. 770, 67 A. 25, 122 Am.St.Rep. 413;

Parker Precision Products Co. v. *Metropolitan Life Ins. Co.*, 407 F.2d 1070 (C.A. New Jersey);
American Policyholders Ins. Co. v. *Portale*, 88 N.J. Super. 429, 212 A.2d 668;
Allstate Ins. Co. v. *Meloni*, 98 N.J. Super. 154, 236 A.2d 402.

In *Parker Precision Products Co.* v. *Metropolitan Life Ins. Co., supra,* which involved a representation of fact and not a warranty, the plaintiff-assured signed an application for life insurance stating that the answers given by him on the application were true and complete. The application did *not* state that the answers given were warranted to be true as in the case at bar. One of the questions on the application made inquiry as to whether the assured had ever been told that she had, or had been treated for, or sought advice concerning chest pain, disease of the heart, arteries or other blood vessels. The assured answered such question in the negative, which answer turned out to be untrue. The Third Circuit Court of Appeals in affirming the lower court's denial of a recovery to the plaintiff-assured said, and we quote:

> "This case is governed by New Jersey law, under which material misrepresentations, *even if innocent,* will justify rescission of a life insurance policy under the doctrine of equitable fraud. Equitable Life Ass. Soc. v. New Horizons, Inc., 28 N.J. 307, 146 A.2d 466 (1958); Gallagher v. New England Mutual Life Ins. Co., 19 N.J. 14, 114 A.2d 857 (1955); Metropolitan Life Ins. Co. v. Tarnowski, 130 N.J.Eq. 1, 20 A.2d 421 (1941). *Furthermore, a misrepresentation is material as a matter of law where knowledge of the truth would naturally influence the judgment of the insurer in making the contract, estimating the risk, or fixing the premium.* Gallagher v. New England Mutual Life Ins. Co., *supra;* Urback v. Metropolitan Life Ins. Co., 127 N.J.L. 585, 23 A.2d 568 (1942); Kerpchak v. John

> Hancock Mut. Life Ins. Co., 97 N.J.L. 196, 117 A. 836 (1922). See Garman v. Metropolitan Life Ins. Co., 175 F.2d 24 (3rd Cir. 1949). Hence, *the misrepresentation in Part B of the application,* denying heart disease and chest pains, was clearly material." (p. 1073) (Emphasis supplied)

It is to be noted that in the above cited case there was no mention made in the application for insurance that the answers given by the applicant to the questions would constitute warranties, as in the case at bar. Nonetheless, the court held that if the answers given were looked upon solely as misrepresentations of fact rather than warranties, still such misrepresentations under New Jersey law, albeit innocent, *are material as a matter of law* where knowledge of the truth would naturally influence the judgment of the insurer in making the contract, estimating the risk, *or fixing the premium.*

The premium charged to plaintiff in this case was predicated solely upon the answers to the questions set forth in the signed Proposal. The Jewelers' Block Rating Slip (Exh. "B", p. 37a) computed the premium based upon such answers in accordance with the rate schedule filed by the defendant Company with the Commissioner of Banking and Insurance of New Jersey. The New Jersey statute (Sec. 17:29A-15) prohibits the insurer from charging or receiving any rate which deviates from the schedule of rates thus filed (p. 9a).

The distinction between "warranties" and "representations" under New Jersey law as stated by the court in the case of *Procacci* v. *U.S. Fire Ins. Co., supra,* is that "warranties" are integral parts of the policy, or are expressly made part thereof by reference, and relate to risk, and are intended to form part of the policy, and must be literally true and strictly fulfilled or the policy is void; whereas "representations" are statements preceding the policy, need

only be substantially true, and will not invalidate the policy except for fraud.

To the same effect, see:

Guarraia v. *Metropolitan Life Insur. Co.*, 90 N.J.L. 682, 101 A. 298;
Dewees v. *Manhattan Insur. Co.*, 35 N.J.L. 366;
Brynildsen v. *Ambassador Insur. Co.*, 113 N.J. Super. 514, 274 A.2d 327.

It has also been held that where the policy in express terms refers to the application or other papers connected with the risk, and adopts them as part of the contract of insurance, they become part of the policy, and the statements therein relative to the situation, use and character of the risk are warranties on the part of the assured.

Carson v. *Jersey City Insur. Co.*, 43 N.J.L. 300, 39 Am.Rep. 584, affirmed, 44 N.J.L. 210.

POINT II

The defendant would have violated the rating laws of New Jersey were it to have covered the risk embodied in Questions 2 and 11 of the Proposal if true answers had been given thereto by issuing a policy for the same premium as was paid by plaintiff.

Chapter 29A (Sec. 17:29A-1 to Sec. 17:29A-32 of New Jersey Statutes Annotated) deals with the subject of insurance rates in the State of New Jersey.

Section 17:29A-6, N.J.S.A., reads as follows:

"§ *17:29A-6.* Rating system to be filed

"Beginning with the sixtieth day after this act takes effect, every insurer shall, before using or applying any rate to any kind of insurance, file with the commis-

sioner a copy of the rating-system upon which such rate is based, or by which such rate is fixed or determined. The filing herein required may, on written notice by an insurer to the commissioner, be made on behalf of such insurer, by a rating organization of which such insurer is a member or subscriber. The provisions of this section shall be deemed to have been complied with by any insurer which had, before the effective date of this act, directly or by a rating organization of which it is a member or subscriber, or by a designated agent or expert, filed with the commissioner a rating-system, substantially in the form required by this section to be filed. From and after the date of the filing of such rating-systems, every insurer shall charge and receive rates fixed or determined in strict conformity therewith, except as in this act otherwise expressly provided. L.1944, c.27, p. 73, § 6."

Section 17:29A-15, N.J.S.A., reads as follows:

"§ *17:29A-15. Rates to be observed; rebates*

"No insurer or employee thereof, and no broker or agent shall knowingly charge, demand or receive a premium for any policy of insurance except in accordance with the respective rating-systems on file with and approved by the commissioner. * * *"

Section 17:29A-17, N.J.S.A., reads as follows:

"§ *17:29A-17. Violations*

"Any insurer which violates any provision of this act, or which fails to comply with the terms of any order made by the commissioner pursuant to the provisions of this act, shall be deemed to have violated the law within the meaning of section one of chapter thirty of Title 17 of the Revised Statutes. L.1944, c. 27, p. 79, § 17."

The case at bar presents the same issue of law which has been passed upon in two Jewelers' Block cases decided in this District construing the applicable New York statute, Sections 149 and 150 of the New York Insurance Law. The first of these cases is *M. Chalom & Son, Inc.* v. *St. Paul Fire & Marine Insurance Company,* 2 Cir., 285 F.2d 909. In that case, the defendant insurance company had issued a Jewelers' Block policy to the plaintiff jeweler insuring against all risks of loss while the plaintiff's property was located both on and off the assured's own premises. The assured sustained a loss of $75,000 after the policy had been issued and there was no question concerning the fact that such a loss had been sustained by the assured. The defendant insurance company contended that it had no liability under its policy because the policy had been induced by the plaintiff assured's misrepresentations concerning the size of its inventory.

A Proposal had been submitted to the prospective assured concerning specific questions for which the applicant was to give written answers. The plaintiff in that case stated in answer to 17a and b of the Proposal that inventories had been taken by it on the particular dates mentioned and that the value of the inventories taken on each such occasion came to the same amount of approximately $96,000. The assured in the foregoing case also stated, in its answer to 17c of the Proposal, that the maximum value of property at any time during the 12-month period involved did not exceed $130,000.

Contrary to the foregoing statement contained in the Proposal, the assured's president, after the loss, stated under oath that the inventories referred to in the answers to 17a and b on the dates referred to in such answers, actually exceeded $150,000. Thus there was a substantial under-valuation of the inventory figures given in the Proposal submitted to the insurance company.

This Court found that had the true inventories been given by the assured in the answers to 17a, b and c of the

Proposal, a policy issued on the basis of the true figures would have been "at a premium higher than set forth in the policy in suit."

This Court then went on to point out that in any event, the defendant insurance company could not have issued the particular policy of insurance at the total premium set forth therein if it had known the true facts as to the higher inventories because to have done so would have meant that the insurance company would have violated the rating laws of the State of New York. Thus this Court stated at page 911:

> "* * * Moreover, defendant would have violated the rating laws of New York, New York Insurance Law, §§ 184, subd. 1, 185, subd. 1, were it to have covered the higher inventory by issuing a policy for the same premium as was paid by plaintiff."

The policy having thus been held null and void by the material misrepresentations of the plaintiff, this Court in the *Chalom* case affirmed the judgment dismissing the complaint and granting summary judgment in favor of the defendant insurer.

The case of *M. Chalom & Son, Inc.* v. *St. Paul Fire & Marine Insurance Company, supra,* was again followed in a later case which also involved the same form of Jewelers' Block policy, the application of Section 149 of the New York Insurance Law, and the statutes with respect to filing of a company's rates and the adherence to such rates. That case was *Wilberg Jewelry Corporation* v. *The Palatine Insurance Company, Ltd.*, S.D.N.Y., 205 F.Supp. 696. Again, in that case, as in the *Chalom* case, *supra,* there were misrepresentations by the assured in its answers to the Proposal. In that case, as in the earlier *Chalom* case, the federal court applied the New York law. The District Court found that there was a material misrepresentation by the assured in the Proposal within the

meaning of Section 149(2) of the New York Insurance Law; and that the policy provisions providing that the entire policy would be void if the assured concealed or misrepresented any material fact concerning the insurance was therefore applicable and judgment was rendered in favor of the insurance company.

The Jewelers' Block policy issued by the defendant to plaintiff herein, as in the *Wilberg Jewelry Corporation* case, *supra,* and the *Chalom* case, *supra,* contains a misrepresentation clause which reads as follows:

> "21. This entire policy shall be void if, whether before or after a loss, the Insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the Insured therein, or in case of any fraud or false swearing by the Insured relating thereto."

The holding in the case of *Chalom* v. *St. Paul Fire & Marine Insurance Company, supra,* was recently followed by Mr. Justice Lane of the Supreme Court, New York County in *Essex Refining Corp.* v. *The Home Insurance Co.,* N. Y. Law Journal, June 18, 1975, Vol. 173, p. 15 (not officially reported), where the court granted the defendant company's motion to dismiss the complaint based upon the assured's unintentional and innocent untrue answer to Question 17 of the Proposal to the Jewelers' Block policy.

The accepted rule in cases involving misrepresentations by an assured in inducing an insurance company to issue a policy is very well set forth in the case of *Hare & Chase* v. *National Surety Co.,* 49 F.2d 447, where the court said at page 456:

> " 'The test of the materiality of a fact was stated by Story, J., to depend upon whether it would have influenced the underwriter "either not to underwrite at all, *or not to underwrite except at a higher pre-*

> *mium''*. Columbian Insurance Co. v. Lawrence, 10 Pet. 507, 516, 9 L.Ed. 512. The more recent cases are in accord with this formulation. [citing cases]' '' (emphasis supplied)

It must, of course, be kept uppermost in mind that the State of New Jersey does not have a statute comparable to Sections 149 and 150 of the New York Insurance Law. In New Jersey, the materiality of the misrepresentation or proof of an increase in the risk need not be established by the company in order to defeat a recovery by the assured for breach of warranty as has been already pointed out in this brief. The mere showing of a breach of warranty, without more, is sufficient. We are dealing here with a breach of warranty by the assured in respect of Questions 2 and 11, and not a mere misrepresentation of fact as argued in Point III of plaintiff's brief.

With respect to the misrepresentation issue in this case as raised in plaintiff's brief, it is important to note that it makes no difference whether the misrepresentations were the result of mistake, ignorance, accident or negligence, or otherwise innocently made. It is not necessary that they be fraudulently made. Thus the basic rule in this regard is set forth in 30 N.Y. Jur. § 917, p. 280. We quote from that section:

> "It is well settled that the fact that the misrepresentation was made in good faith, or as a result of inadvertence, mistake, negligence, or ignorance, will not preclude it from being deemed material and a cause for the avoidance of the policy procured in reliance upon it, and if such a misrepresentation induces the insurer to assume the risk which otherwise it would not have taken, *at least not at the rate of premium charged*, there is a legal ground of avoidance, and actual fraud need not be established, since it is not a material factor in avoidance of the contract under such circumstances. Thus, it has been held that false representations, if

material to the risk, avoid the policy even though made in good faith. Under this view, in cases where the misrepresentation is positive and of a fact actually material, it is not necessary to prove that the representation was fraudulently made, since the materiality of the misrepresentation, and its proof of falsity, do away with the necessity of showing actual fraud. * * *" (emphasis supplied)

POINT III

The failure of the plaintiff (a) to render to the Company a sworn proof of loss within sixty days after the loss herein, and (b) to furnish a complete list of the lost property stating the market value and cost of each article and the amount claimed thereon, and (c) to give immediate notice in writing of the loss to the Company is a breach of conditions precedent in the policy and bars a recovery by the plaintiff in any event.

Aside from any question relating to plaintiff's breach of warranty in furnishing untrue answers to Questions 2 and 11 of the Proposal, the plaintiff is in any event barred from effecting a recovery by reason of its failure to comply with any of the three (3) conditions precedent in the policy (Clause 13) requiring an assured (a) to render to the Company within 60 days after a loss a sworn proof of loss containing certain precise data, and (b) to furnish a complete list of the lost property stating the market value and cost of each article and the amount claimed thereon, and (c) to give immediate written notice of the loss to the Company.

(a) The Failure of Plaintiff to File a Sworn Proof of Loss.

The court below has specified in detail (pp. 101a-102a) the manner in which the signed statement given by plaintiff

to the defendant's representative on June 1, 1971 failed to comply with the condition precedent of the policy (Clause 13) relative to the requirement for the filing of a sworn proof of loss. We need add nothing to the court's statement on this point. Needless to say, the question as to what constitutes a proper written proof of loss is a question of law and not one of fact.

(b) The Failure to Furnish a Complete List of the Stolen Property Stating the Market Value and Cost of Each Article and the Amount Claimed Thereon.

In addition to his failure to file a proper proof of loss in compliance with Clause 13 of the policy, the plaintiff further failed to furnish to the Company at any time a complete list of the stolen property stating the market value and cost of each article and the amount claimed thereon (p. 96a). A feeble attempt was made by plaintiff in the court below to show compliance with this latter provision of the policy but no adequate evidentiary proof was submitted by plaintiff to establish such compliance. Reference was made by plaintiff in the court below to certain office records described as plaintiff's inventory book, bills of purchase, and plaintiff's book of sales, etc. (Plaintiff's Exhs. 1 through 6), but such material was obviously not the complete list of the stolen property, with the requisite information, as required by the above mentioned clause of the policy. Significantly enough, plaintiff has declined to include plaintiff's Exhibits 1 through 6 in the Joint Appendix, notwithstanding the request contained in the Reply Designation by appellee herein. A question of law is presented as to whether plaintiff complied with this provision in the policy and not a question of fact.

(c) The Failure of Plaintiff to Give Immediate Notice in Writing of the Loss to the Company.

The facts dealing with plaintiff's failure to give immediate *notice in writing* of the loss *to the Company* have

been referred to in other portions of this brief and need not be again referred to at this point. Suffice it to say that the court below has held, as a matter of law, that proper written notice of loss was not given by plaintiff to the defendant Company in compliance with Clause 13 of the policy. This again presents a question of law and not one of fact.

Plaintiff in his brief while admitting that he did not give written notice of the loss to the Company or to the Company's agent, W. M. Ross & Co. Inc., makes much of the fact that W. M. Ross & Co. Inc. acted solely as plaintiff's agent in forwarding to the Company its own form of notice of loss. It has been held in New Jersey that in the absence of special circumstances, the insurer's agent who solicits or effects insurance is clearly *not* the agent of the assured.

> *Volker* v. *Conn. Fire Ins. Co.*, 22 N.J.Super. 314, 91 A.2d 883.

Plaintiff argues (POINT IV) that he has "substantially complied" with the conditions precedent in the policy. For authority, the plaintiff cites two old decisions not in point and ignores later more relevant holdings. The *Biederman* case cited by plaintiff dealt with an entirely different notice of loss provision under a theft policy which required notice of loss by telegram. Plaintiff, however, ignores two decisions which hold under New Jersey law that telephone notice does not fulfill a requirement of written notice of claim. *Lehroff* v. *Continental Cas. Ins. Co.*, 101 N.J.L. 375, 128 A. 245 (E. & A. 1925), and *Miller* v. *Zurich Gen. Acc. & Liability Ins. Co. Ltd.*, 36 N.J.Super. 288, 115 A.2d 597. This Court will note that the above-cited two decisions treat the question of adequacy of notice of loss as one of law.

Furthermore, it is stated in plaintiff's brief that the court in *Evans* v. *Farmers Reliance Ins. Co.*, 110 N.J.L. 159 (E. & A. 1932), found substantial compliance with the sworn proof of loss requirement based on the portion of the

decision quoted in plaintiff's brief (p. 20). This is not the rationale of the court. It was held that the company waived the sworn proof of loss requirement by telling the assured (before a proof was filed) that he would have to sue for his money. Thus, the court spoke not at all concerning "substantial compliance" with the policy requirement.

The New Jersey cases are uniform in holding that an insured's failure to fulfill a condition precedent in the policy, such as giving *timely written* notice or *filing a sworn proof of loss,* is a defense to an action on a policy. One of the most often cited cases for this proposition is *Whittle* v. *Associated Indemnity Corp.,* 130 N.J.L. 576, 33 A.2d 866 (E. & A. 1943). Under consideration was a condition requiring written notice of accident under an automobile liability policy. The following language exemplifies New Jersey's view as to conditions precedent, and the issue of prejudice to the insurer:

> "And if the test were that it must be shown that the failure to fulfill the conditions precedent prejudiced the insurer, the trial judge might well have been justified, under the proofs, in submitting the case to the jury. But that is not the test. The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end (cf. *Kinderwater* v. *Motorists Casualty Ins. Co., supra,* 120 N.L.J. at page 376, et seq., 199 A. at pages 608, 609), for 'there has been a failure to fulfill a condition upon which (insurer's) obligation is dependent.' *Coleman* v. *New Amsterdam Casualty Co.,* 247 N.Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443." (p. 869)

The more recent case of *Figueroa* v. *Puter,* 84 N.J. Super. 349, 202 A.2d 195 (App.Div. 1964), concurs with, and relies on the *Whittle* decision:

> "It is well settled that an insurance company will be relieved of liability where the insured has failed to

fulfill the condition precedent of the policy of giving timely *written* notice of an accident covered by the policy, *and this regardless of whether the company has been prejudiced by such failure.*" (p. 197) (emphasis supplied)

The following language is contained in *Brindley* v. *Fireman's Ins. Co. of Newark,* 35 N.J. Super. 1, 113 A.2d 53 (App.Div. 1955), an action on a windstorm policy:

> "*Where the giving of notice of loss or the furnishing of proofs of loss* is a condition precedent of liability under an insurance contract, as we conclude was here the case, non-compliance is fatal to recovery in the absence of a showing of waiver or at least of substantial compliance. *Dikowski* v. *Metropolitan Life Insurance Co.,* 128 N.J.L. 124, 24 A.2d 173 (E. & A. 1943); cf. *McNamee* v. *Metropolitan Life Insurance Co.,* 137 N.L.J. 709, 61 A.2d 271 (E. & A. 1948).
>
> * * *
>
> "Our courts have generally held that the test is not whether an insurer is prejudiced by a breach of condition in the policy, but simply whether the breach in fact occurred." (pp. 58-59) (emphasis supplied)

The following cases also support the proposition that the non-fulfillment of a condition precedent is fatal to recovery, *even absent a showing of prejudice to the insurer:*

> *Allstate Ins. Co.* v. *Campbell,* 95 N.J. Super. 142, 230 A.2d 179 (Superior Ct. 1967);
>
> *United Nat'l Indemnity Co.* v. *Sanguiliano,* 38 N.J. Super. 400, 119 A.2d 35 (Superior Ct. 1955);
>
> *Associated Metals & Mineral Corp.* v. *Dixon Chemical & Research, Inc.,* 82 N.J. Super. 281, 197 A.2d 569 (App.Div. 1963);
>
> *Miller* v. *Zurich General Accident & Liability Ins. Co.,* 36 N.J. Super. 288, 115 A.2d 597 (App.Div. 1955);

Atlantic Casualty Ins. Co. v. *Interstate Ins. Co.*, 28 N.J. Super. 68, 100 A.2d 192 (App.Div. 1953) (sole ownership clause).

The decision in *Cooper* v. *Government Employees Insurance Co.*, 51 N.J. 86, 237 A.2d 870, dealing with a breach of the notice of loss requirement, relied upon by plaintiff in the court below, is not contra to the decisional law cited in this brief. The *Cooper* case, *supra,* was an action on an automobile liability policy. The court reversed the Appellate Division and affirmed the trial court's finding that there was no breach of the notice of loss requirement. However, in dictum, the court indicated that it would break from the holding in *Whittle* v. *Associated Indemnity Corp., supra,* and require prejudice to the insurer, in order to avoid the policy. The Supreme Court of New Jersey has not subsequently made this the rule in New Jersey as far as is known. The language in the *Cooper* case, *supra,* clearly indicated that it is motivated by policy considerations and is to be properly limited to automobile liability insurance. Further, the *Cooper* case dealt solely with a breach of a notice of loss provision in the policy and has no bearing whatever on cases involving an assured's failure to file a sworn proof of loss or other conditions precedent in the policy.

The law of New Jersey on several of the points hereinbefore expresed is best summed up in a recent decision handed down by Mr. Justice Asch of the Supreme Court, New York County in *J.A.G. Trucking* v. *The Continental Insurance Co.* (N.Y. Law Journal, p. 17, May 8, 1975, Trial Term, Part 11) (not officially reported), regarding the effect of a breach of warranty or condition precedent in the policy. Mr. Justice Asch there said and we quote:

> "A party will not be relieved from its contractual obligations because of ignorance through neglect or inexcusable trustfulness. In the absence of fraud or other wrongful acts on the part of the insurer the

plaintiff is conclusively presumed to know the contents of the policy and to assent to its terms (Metzger v. Aetna Insurance Co., supra). As the court said there:

" 'To hold that a contracting party who, through no deceit or overbearing inducement of the other party, fails to read the contract, may establish and enforce the contract supposed by him, would introduce into the law a dangerous doctrine. Of course, the doctrine does not exist. It has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not.' (See also, Del Monte v. Travelers Insurance Co., 17 N.Y.Supp.2d 555.)

* * *

"The terms of the insurance contract must be construed under the laws of the State of New Jersey because the contract was made, drawn and delivered in New Jersey, between two New Jersey residents, and was to be performed in New Jersey (F. A. Straus v. Canadian Pacific Railway Co., 254 N.Y. 407).

"Where a breach of warranty is concerned, various jurisdictions have taken differing positions concerning the effect of such breach on the policy. The law in New Jersey is clear that a breach of an express warranty voids the policy, and that the insurer need not show that it has been prejudiced by such a breach (Brynildsen v. Ambassador Insurance Co., 274 A.2d 327). In that case the court distinguished between warranties, representations and conditions. (see also, Atlantic Cas. Insurance Co. v. Interstate Ins. Co., 100 A.2d 192; Whittle v. Associated Indemnity Corporation, 33 A.2d 866). In the latter case the court said:

" '*The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at end* (cf. Kinderwater v. Motorists Casualty Ins. Co., supra, 120 N.J.L. at page 376, et seq., 199 A. at pages

608, 609). For *"there has been a failure to fulfill a condition upon which [insurer's] obligation is dependent."* Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443.'

"Accordingly, the defendant need not prove that it was prejudiced by the insured's breach of warranty." (emphasis supplied)

Although the court below stated that in light of its decision that plaintiff's breach of warranty voided the policy, it felt no need to reach the question of whether plaintiff's failure to file a proof of loss, as required by the policy, likewise required the granting of summary judgment (p. 104a), nevertheless, this Court sitting as an appellate court has the power to affirm the decision of the lower court, albeit on some other grounds found in the record.

Riley v. *Commissioner,* 311 U.S. 50;
Helvering v. *Gowran,* 302 U.S. 238;
Lum Wan v. *Esperdy,* 321 F.2d 123 (2d Cir.).

POINT IV

Neither waiver nor estoppel can be legally found on the facts presented by the parties upon the motion in the court below.

(a) Waiver.

The policy in suit expressly provides that no agent has authority to waive or modify any conditions or stipulations in the policy, nor shall notice to or knowledge possessed by an agent or any other person be held to effect a waiver or change in any part of the policy unless endorsed thereon (pp. 16a-17a, Clause 7 of policy).

It has been held in New Jersey that the holder of the policy is bound by such limitations of the agent's authority. *Catoir* v. *Amer. Life Ins. & Trust Co.,* 33 N.J.L. 487.

It has also been held that the fact that an insurer, while denying liability, participated in conferences looking toward settlement, did not *estop* the insurer from denying liability, nor constitute waiver of a defense.

> *Central Radiator Co.* v. *Niagara Fire Ins. Co.*, 109 N.J.L. 48, 160 A. 342.

A denial of liability by an insurer based upon an assured's failure to file a sworn proof of loss does not waive the insurer's right to set up such failure to file proof of loss as a defense to the action.

> *Radwanski* v. *Scottish Union and Natl. Ins. Co.*, 100 N.J.L. 192.

In the case at bar, there was no denial of liability by the defendant Company within the 60-day period from date of loss for the filing of a sworn proof of loss by the assured, and no waiver of this requirement of the policy can be found in the record.

(b) Estoppel.

Plaintiff's entire argument predicated upon the theory of estoppel is grounded upon the contention that defendant's agent allegedly had knowledge of "all facts" on the date of the signing of the Proposal and that the defendant Company issued the policy with full knowledge of all facts and after retaining the premium paid by plaintiff.

As pointed out previously, there is nothing in the record to substantiate plaintiff's contention that the defendant failed to return or tender a return of the earned or unearned portion of the premium. Neither was this question raised at any time in the court below. The exact same point regarding the retention of premium in a breach of warranty case not passed upon by the court below was raised by the plaintiff-assured in *Procacci* v. *United States*

Fire Insurance Co., 118 N.J.L. 423, and the appellate court there declined to consider such point. In that case, the New Jersey appellate court said:

> "The only other contention made by the appellant is that the defendant was not entitled to a judgment because it failed to return, or tender a return of, the unearned portion of the premium on the policy in question. As to this, it is sufficient to say that the point is not now available to the appellant to bring about a reversal, even if the point were meritorious. We express no opinion whatever on whether it has merit. The question was not raised in the court below. Only an objection which was laid before the trial court will be considered by an appellate court in review of the trial court's judgment. *State* v. *Barris*, 78 N.J.L. 14; *McCloud* v. *Illinois Surety Co.*, 83 Id. 572." (p. 428)

This Court made the same ruling in *Terkildsen* v. *Waters*, 481 F.2d 201, where this Court said:

> "Under these circumstances, we see no reason to depart from the general rule of practice which forecloses appellate consideration of issues not raised below. See, e.g., Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). Adherence to the rule is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court."

Even if we were to assume, *arguendo*, that the point of alleged retention of the premium could be raised on appeal although not raised in the court below, nevertheless, the case of *N.J. Rubber Co.* v. *Commercial Assurance Co.*, 64 N.J.L. 580 (E. & A. 1900), cited in plaintiff's brief, is com-

pletely distinguishable on the facts from the case at bar. In that case, the defense by the Company was based on a breach of warranty (failure to procure additional insurance). The conduct that effected the waiver was a course of negotiations and correspondence between the assured and the Company after knowledge of the breach of warranty. Subsequent to all of this, the Company canceled the policy, retaining the pro rata earned premium. The decision in that case could well be construed so as to hold that the Company's waiver was created by its conduct in negotiating, etc. with the assured rather than its retention of the premium.

Plaintiff maintains that defendant's agent, Forrester, had knowledge of "all facts" at the time of the signing of the Proposal on April 27, 1971 and that, accordingly, the defendant is estopped from asserting that the plaintiff's answers to Questions 2 and 11 are untrue. Such position is inherently bad because it is in violation of the parol evidence rule. In any event, as we have previously pointed out in this brief, even if it is assumed, *arguendo*, that Forrester had such alleged knowledge, the same is wholly immaterial and irrelevant in view of the fact that the plaintiff-assured is *conclusively* presumed to have read the Proposal before signing same and is bound by the answers contained therein absent any evidence of fraud on the part of the defendant or its agent. There is no evidence of fraud on the part of the defendant anywhere in the record. The plaintiff, an experienced jewelry merchant long familiar with Jewelers' Block policies and the method of rating such policies, always had the opportunity open to him to have read the clear and unambiguous questions in the Proposal and to have insisted on the insertion of appropriate answers therein in accord with the true facts, despite any knowledge allegedly possessed by the defendant's agent. The case of *Harr* v. *Allstate Insurance Co.*, 54 N.J. 287, strongly relied on by the plaintiff, is clearly distinguishable on the facts from the case at bar. In the

Harr case, the record discloses that the insurer's agent misrepresented to the prospective assured the coverage afforded under the contract and the exclusions from such coverage, and that the prospective assured relied upon such misrepresentations to his ultimate detriment. The court there held that the insurer was estopped to deny coverage after a loss on a peril not actually covered by policy terms. In the case at bar, however, no misrepresentation of fact by defendant's agent is even alleged, let alone proven. Furthermore, there is missing herein the further and very important element of reliance on the part of the plaintiff since the plaintiff could always have read the Proposal itself without relying upon defendant's agent or upon anyone else.

In addition, in the *Harr* case, no application for insurance was involved calling for answers to certain questions connected with the risk and the premium, all of which answers were warranted to be true. The argument which appears to be mandated in the *Harr* case is that New Jersey's Supreme Court was dealing with a situation of affirmative negligent conduct and misrepresentation on the part of the company's agent, rather than, as here, alleged knowledge on the agent's part of the incorrectness of answers provided by the assured in an application or proposal. Any statement contained in the court's decision in the *Harr* case concerning the validity of the *Dewees* line of cases, *supra,* is pure dictum. Thus, since New Jersey's highest court chose not to extend the doctrine that far, a federal court sitting in diversity cannot so extend it. A study of the *Harr* case, and plaintiff's stated position, clearly discloses that there is no merit whatever in the estoppel theory on the foregoing point.

Likewise, the added point made by plaintiff that defendant issued the policy of insurance after receipt of the assured's signed statement of June 1, 1971, allegedly containing certain facts (Exh. "C"), and is therefore estopped from asserting all defenses available to it under the

policy, also has no real merit to support it. In advancing such proposition, it is clear that plaintiff overlooks the fact that the rights and obligations of both parties to the insurance contract came into existence at the time of the written binder on May 7, 1971 and not on the date of the issuance of the policy. If a loss had occurred on May 7, 1971, or prior to the date of the actual issuance of the policy, the defendant would have been obligated to pay the amount of said loss pursuant to the terms and conditions of the policy of insurance (Jewelers' Block) in use at that time. It would be incongruous to say that one party to the contract of insurance was bound by the terms and conditions of said contract on May 7, 1971 and not the other party. Furthermore, the failure of the plaintiff to comply with the conditions precedent contained in Clause 13 of the policy occurred at a time subsequent to the issuance of the policy when defendant's alleged knowledge of the "facts" could not be a controlling factor insofar as estoppel is concerned.

Conclusion

Since no triable issues of fact exist with respect to the breach of warranty defenses and/or the breach of conditions precedent defenses, the Order and Judgment of the lower court granting summary judgment in favor of defendant should be affirmed.

Respectfully submitted,

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By Leonard J Joffe